United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7386

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-7386, 76-7393, 76-7417 and 76-7446

VANA TRADING CO., INC.,
Plaintiff-Cross-Appellant-Appellee,

—against—

S.S. "METTE SKOU", her engines, boilers, etc., and FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Defendant-Third-Party Plaintiff-Appellant-Appellee,

—against—

OVE SKOU and INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendants-Cross-Appellants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT-APPELLEE, FLOTA MERCANTE GRANCOLOMBIANA, S. A.

RENATO C. GIALLORENZI
Attorney for Defendant-Third-Party Plaintiff-Appellant-Appellee, Flota Mercante Grancolombiana, S.A.
67 Broad Street
New York, New York 10004

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Reply to Plaintiff-Appellee and Cross-Appellant's Brief

Plaintiff in Point I of its brief stated that Flota should be liable for all of the damages which plaintiff claims it sustained on the ground that Flota failed to separate damages in accordance with the rule laid down in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934). The *Vallescura, supra* is applicable only to those cases where the plaintiff has sustained its burden of proof that the cargo was fit for the transportation which the ocean carrier was requested to undertake. This burden has not been sustained in the present case, as the evidence at trial affirmatively showed that the yams at the time of shipment were in a susceptible condition, and that the self heating to the shipment of yams was solely due to the fact that they were in an advanced state of maturity at the time shipped. Further, the yams were improperly packed in newsprint type paper and cartons which did not have adequate breathing holes which intensified the self-heating of the yams.

The correct rule to be applied is stated in the decision of this Court in the *Niel Maersk,* 91 F.2d 932 (2 Cir. 1937), cert. denied sub. nom 302 U.S. 753 (1937) which limited the holding in the *Vallescura* to those actions where the good order and condition of the shipment was not at issue.

Plaintiff in Point II of its brief (pp. 10, 11, 12) states that if the shipment was improperly packaged then the fault for the loss caused by the improper packing of the yams, should not fall upon the plaintiff consignee who was a bona fide purchaser who had no control in determining the type of packing. This argument is without merit since the Carriage of Goods By Sea Act (1936) applies equally to the shipper, consignee and the carrier.

Plaintiff at page 12 of its brief after first making the argument [illegible] not be penalized for the improper packaging [illegible] at the defendant carrier may avail itself of the defense of "insufficiency of packing" as one of the enumerated defenses of COGSA, regardless of whether the fault is attributable to the plaintiff.

In *S.M. Wolff Company* v. *The SS Exira,* 200 F. Supp 809, 811 (D.C.S.D. N.Y. 1961) in dismissing an action brought by a consignee for alleged damages caused to a shipment of fig paste held that "* * * the respective rights and liabilities of the parties in this action must be decided in accordance with the applicable provisions of the Carriage of Goods by Sea Act * * *"

To the same effect: *Rhinetubes, Inc.* v. *Norddeutscher Lloyd, et al.,* 335 S.W. 2d 269, at 271 (1960) where the Court wrote:

> "The obligations and liabilities as between appellant (consignee) and ship-carrier are controlled by the bill of lading and the United States Carriage of Goods by Sea Act, 46 U.S.C.A. Sec. 1300, et seq."

The defenses set forth in COGSA in favor of the shipowner, are applicable to a consignee whether or not the insufficiency of packing or any other defense thereunder was attributable to the acts of the shipper.

Plaintiff, in Point II of its brief (pp. 12, 13) states that the defendant carrier had knowledge of the packing of the yams and having accepted the said cargo without objection was bound to use special care in stowing the cargo and cited in support of its contentions *The Kerlew,* 43 F.2d 736 (S.D.N.Y. 1924) a decision which was rendered prior to the enactment of COGSA.

The soundness of *The Kerlew, supra,* was questioned in *S.M. Wolff Company, supra* at page 812 where the Court wrote:

"[5] At this point, libellant advanced the further contention that, even if some damage was caused by insufficient packaging, respondent was aware of such insufficiency, and was thus bound to use special care in stowing the cargo. In support of its contention, libellant relies upon the doctrine enunciated in The Kerlew, 43 F.2d 732 (D.C.S.D.N.Y. 1924). The Kerlew case was decided prior to the enactment 46 U.S.C. § 1304, 46 U.S.C.A. § 1304. Since insufficiency of package is specifically included as an exception to the carrier's liability under 46 U.S. C. § 1304(2) (n), 46 U.S.C.A. § 1304(2) (n), it would appear that the strength of the doctrine set forth in The Kerlew is somewhat diminished. The responsibility of the carrier to stow and handle the cargo properly, as set forth in 46 U.S.C.A. § 1303(2), must be read in conjunction with the exceptions set forth in 46 U.S.C.A. § 1304, in order to determine the respective responsibilities of each party.

In Bache v. Silver Line, 110 F.2d 60 (2d Cir. 1940), the Court of Appeals of this Circuit recognized the inter-relationship between improper packaging and proper stowage. In the Bache case, the Court held that a rule of reason was to be applied in determining whether the carrier had used reasonable care in stowing the cargo considering the nature of the shipment and the type of packaging used. The Court recognized that the shipper cannot cast the burden of extra special stowage on the carrier by simply not packaging the shipment properly."

This argument that the cargo should have been rejected is inapplicable. Further, it certainly is not for the car-

rier to judge which is the best type of package for a particular commodity, since it is the shipper that has superior access to information regarding the type of cargo which is to be carried and the best way to package the cargo for shipment.

Plaintiff at Point II of its brief (pp. 13, 14) states that the stowage was the principal culprit for the damage which was incurred. There can be no criticism of the manner in which the cargo was stowed, because the evidence at trial demonstrated clearly that there were sufficient air aisles and adequate ventilators to service the deeptanks. As it was proven in the Court below that the damage resulted from a combination of improper packing plus the susceptible condition of the yams, under such circumstances the plaintiff to recover must affirmatively prove negligence in the stowage or care of the cargo and that such negligence on the carrier's part caused or contributed to the loss or damage.

In *Schroeder Bros. Inc.* v. *The Saturnia,* 123 F. Supp. 282 (S.D.N.Y. 1955) aff'd 226 F.2d 147 (CA 2 1955) Judge Edelstein wrote at page 282 as follows:

> "The respondent here relies on the statutory exceptions of strike and inherent vice, 46 U.S.C.A. § 1304(2)(j) and (m). If a carrier establishes that damage is caused by one of the enumerated exceptions, it will not be held liable unless it appears that its negligence contributed to the damage, and the burden of proof upon that issue is upon the libellant. Schnell v. The Vallescura, supra; Pettinos v. American Export Lines, D.C., 68 F.Supp. 759, affirmed, 3 Cir., 159 F.2d 247."

The law in this circuit is too well established to require the citation of authority for the principle that there

can be no finding that the carrier's "negligence contributed to the damage", until the cargo interests satisfy the Court by a preponderance of the evidence that the carrier was negligent, and that such negligence proximately caused or contributed to the damage. Furthermore, the plaintiff must of necessity show what could have reasonably been done by the Master was not done, and that had the master taken such steps, the damage to the cargo would thereby have been lessened. The facts in this case are to the contrary, for the Lower Court found that the cargo was properly stowed by Flota, and the master continuously ventilated the deeptanks to the best of the vessel's ability. The stowage was not the culprit for the damage which ensued, and the causes of the damage were simply the inherent vice of the cargo and the insufficiency of the packing.

A shipper who has tendered goods for transportation in external good order and condition, entitled the master to rely on their fitness for carriage. In *The Santa Clara*, 281 Fed. 725 (CA 2, 1922) 735-6 this court wrote as follows:

> "On the general implied warranty that the shipper was obligated to furnish a safe cargo."

Plaintiff states in Point II of its brief (pp. 14, 15) that the packing was normal and customary; it ignores completely the testimony of the President of the plaintiff and that of McCabe and Axiotis, expert witnesses called by the plaintiff. These experts stated that the breathing of the yams was seriously impaired by the paper in which they were individually wrapped which initially caused the yams to retain heat and eventually cook in their own juice. There is therefore, no need to dwell on the question of the insufficiency of packing, since the lower Court found the packing improper largely on the basis of the testimony of the very witnesses offered by the plaintiff at trial.

In Point III of the plaintiff's brief, it is alleged that there was substantial evidence as to the actual good order and condition of the yams prior to the shipment and additionally that the defendants failed to prove the defense of inherent vice. The only manner in which the condition of the yams could have been determined at the time of shipment, was to cut a sufficient number of yams immediately prior to shipment to determine their internal condition. This was not done. A superficial inspection of the yams was insufficient to determine whether or not the yams contained contaminants which in turn would cause the yams to rot.

Plaintiff cites *Daido Line* v. *Thomas P. Gonzales Corp.*, 299 F.2d 669 (C.A. 9 1962), at pages 18 and 19 of its brief as the basis for the position taken by it that the defendants had failed to prove the defense of inherent vice. While it is true that in *Daido, supra,* the Court found that the garlic was free from inherent vice the proof as to the manner in which the good order and condition was *established* was stated by the Court in a footnote found at page 674, "* * * *the inspection included cutting into a sampling of the garlic to detect such internal defects;* and the testimony was that the inspection certificates disclosed "none whatsoever". (Emphasis supplied).

Plaintiff offered no evidence that a sample number of yams were cut in order to detect if any rot was present. The minimum and most important standard as recognized by the Court in *Daido, supra* necessary to prove good order and condition, namely the cutting of the yams, was not met. This standard to determine the condition of the yams by cutting should have been used particularly where the shipper was dealing with yams which were far past their maturity.

In Point VI of the plaintiff's brief, it takes the position that the evidence supported a finding that ITO's liability should be limited to $1,000.00. The plaintiff urges that although the parties, i.e., Flota and ITO, had an opportunity to assess their respective damages, they did not so avail themselves but rather chose to enter into a stipulation awarding indemnity of $1,000.00 in favor of Flota and against ITO. Plaintiff, obviously has misread this stipulation entered into by all parties, which expressly stated that such stipulation was without prejudice to all rights of appeal which any party might have including the issue of the allocation of fault.

Reply to Third-Party Defendant-Appellee, Ove Skou's Brief

Skou states at page 7 of its brief that Flota apparently did not wish to incur the expenses of shifting cargo at Cartagena, however, that is not in accord with the facts, for Larsen, the chief mate, testified that when the vessel arrived at Cartagena, coffee was shifted so that the yams could be loaded into the deeptanks (522a). Therefore, the statement made by Skou at page 7 of its brief that Flota did not wish to incur expenses in shifting the cargo at Cartagena, is without basis, for, in fact, Flota did incur the expenses of shifting 1,000 bags of coffee for the purpose of loading the yams into the deeptanks and the decison to shift the coffee was made solely by the Captain of the METTE SKOU (522a).

Skou, having recognized its obligations to ventilate the cargo under Clause 12 of the Charter Party (Flota's Ex. L, 452a), which provides *"that the Captain shall use diligence in caring for the ventilation of the cargo"*, now contends that since that under Clause 30 of the same

Charter Party it was obligated only to electrically ventilate all of the holds, and since the vessel's mechanical ventilation was not warranted as to the deeptanks, that Skou would have no obligation to ventilate said tanks. Skou states at page 28 of its brief that if cargo had been loaded by Flota in the wing tanks or the forepeak, it could not expect ventilation, which is true because both the forepeak and the wing tanks contain no ventilators. However, the deeptanks where the yams were stored have ventilators. Although the Charter Party did not expressly warrant that the deeptanks had ventilation, nonetheless, mechanical ventilation existed in them in the form of the same type of electrical ventilation which existed in all of the vessel's holds, and which was expressly warranted in Clause 30 of the Charter Party. The mere fact then that Clause 30 of the Charter Party did not specifically warrant that the deeptanks were also electrically ventilated did not absolve Skou of its duty to ventilate cargo stowed in them, because the deeptanks did, in fact, have electrical ventilation of the same type which was maintained in the deep holds. Although the Charter Party was silent in Clause 30 with reference to the electrical ventilation in the deeptanks, it was obvious that these tanks were equipped with an electrical ventilation system and the warranty in Clause 30 by implication extended to the deeptanks.

Skou states at page 28 of its brief that since the Charter Party specified that the Captain would use due diligence for the ventilation of the cargo, it referred only to those spaces equipped with ventilation. Since it was proven conclusively *that the deeptanks were equipped with ventilation,* the Captain, *under the terms of the Charter Party was obligated to use due diligence to care for the ventilation of the yams.* Thus, if the cargo was outturned at New York in a damaged condition due to a certain meas-

ure of heat as found by the lower court (17a), then it is obvious that this measure of heat was allowed to build up because the Captain failed to use due diligence in caring for the ventilation of the yams. While it has been argued that the Captain was the borrowed servant of Flota, the charterer, for the purpose of loading and stowing the cargo, that argument certainly cannot and has not been applied in regard to the owner's and the Captain's responsibility for the ventilation of the cargo.

In fact the only argument made with regard to the Master insofar as ventilation was concerned is that he was only obligated to use diligence to care for the ventilation of the cargo in the areas of the vessel equipped with ventilation. Since under the Charter Party the owner remained responsible for the navigation of the vessel and all other matters as when trading for its own account under Clause 26 (453a), it is obvious that if there was any lack of diligence in the ventilation of the cargo that became the sole responsibility under the terms and conditions of the Charter Party of Skou *and not Flota,* which certainly had no control over the care and custody of the yams after the vessel left Cartagena. There being no finding that the cargo was improperly stowed, it must follow that the measure of heat which built up was due to the failure of the vessel's ventilation capacity to transport the yams safely and, therefore, Skou must bear the damages.

Reply to Brief of Third-Party Defendant-Cross-Appellant-Appellee, International Terminal Operating Co., Inc.

ITO states at page 10 of its brief that it did not guarantee to Flota that it would have the necessary gangs available to unload the vessel. This, of coures, is contrary to the testimony given by Kristianssen, the Executive Vice President of Flota's New York agent, who stated that he would not have given the unloading operation to ITO, but for the fact that they assured him that six gangs would be available to expeditiously unload the METTE SKOU upon its arrival in New York. Undoubtedly, ITO made these assurances in order to obtain Flota's business, yet ITO was acutely aware of the distinct possibility that the number of gangs ordered would not be provided by the hiring hall and it would be unable to provide six gangs to unload the METTE SKOU. Therefore, since ITO knew that the strong possibility of insufficient gangs being sent existed, ITO should not have given assurances to Flota's agent that it would have six gangs available to unload the vessel upon its arrival.

At page 11 of its brief, ITO states that the record is clear that Flota and not ITO made the decision to discharge the coffee first rather than the yams. The evidence is to the contrary. Sabazco, an employee of Flota's New York agent, stated in his direct examination:

> "Q. Did you speak with anyone regarding the unloading of the yams?
> A. Not at all." (243a)

Larsen testified in a deposition:

> "Q. Did you make any recording with regard to the failure to discharge the yams on July the first, 1974?

A. Yes, but, unfortunately, there is a little mistake here, because I wrote . . . we have another one where we write with normal pencil.

Q. The rough log book?

A. The rough log and there I wrote that Grancolombiana representative refused to discharge the actual cargo, the yams, here, (Answer continuing) at work's beginning the stevedores was requested to discharge from the deeptanks. This was not done. (494a)

Q. And that clearly says that you requested the stevedores to discharge the yams, is that correct?

A. Yes." (535a)

It is obvious from the foregoing testimony that ITO, which made the final decision as to the manner and method in which the cargo was to be unloaded, refused to unload the yams first rather than the coffee.

The Court having found that the yams suffered damage by reason of the negligent handling and/or storing on the pier, by ITO, properly stated that Flota was entitled to indemnity from ITO. The stipulation entered into among the various parties relative to the division of damages (7a) was prefaced with the remarks that it was "* * * without prejudice to the rights of appeal * * *," including the allocations of fault. The stipulation is therefore not binding against either Flota or ITO as to the amount of the damages. Having found that ITO was negligent in the performance of its duties, the Court correctly granted indemnity to Flota, but incorrectly limited Flota's indemnity from ITO to $1,000.00.

CONCLUSION

The judgment of the Lower Court should be reversed and the complaint dismissed or, in the alternative, should be modified to the extent of granting indemnity to Flota against Skou and ITO, together with reasonable counsel fees.

Respectfully submitted,

RENATO C. GIALLORENZI
Attorney for Defendant-Third-Party Plaintiff-Appellant-Appellee, Flota Mercante Grancolombiana, S.A.
67 Broad Street
New York, New York 10004
Telephone: 425-1773

RENATO C. GIALLORENZI
RICHARD A. SENFTLEBEN
Of Counsel

575—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VANA TRADING CO
VS
SS . METTE SKOU
VS
OVE SKOU"

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:
ROBERT FORD being duly sworn,

deposes and says that he is over the age of 21 years and resides at 755 Hancock st, Bklyn NY

That on the 22 day of November 1976

he served the annexed reply brief for defendant thied;' partyp plaintiff upon appellant-appellee Flota Merchantile Grancolombiana

1. Haight Gardner Poor & Havens, One State Street Plaza, NY, NY
2. Hill Rivkins Carey Loesberg & O'Brien, 96 Fulton Street, NY, NY
3. Purrington & McConnell, 40 Wall Street, NY, NY

in this action, by delivering to and leaving with said attorneys two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 22nd day of November, 1976

Robert L. Ford

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977